

**NHPA 106 Consultation on FL Assumption Request
Issues raised by consulting parties as of 12/01/20**

ACHP

- No issues currently

FDEP

- Does not want to sign PA

Florida SHPO

- EPA has not spoken with SHPO

Choctaw Nation of Oklahoma

- Desire for individual consultations on individual projects.
- The Tribe wants to ensure they will have the opportunity to review individual projects for concerns.
- The Tribe intends to offer additional comments for consideration in development of the programmatic agreement including: 1) post review discovery, 2) discovery of human remains, and 3) language regarding non-disclosure agreements and photography prohibitions.

Miccosukee Tribe of Indians of Florida

- The Tribe has cultural resources and an interest in a variety of lands. The Tribe believes permits on those lands should trigger government to government consultation and an opportunity for tribes to be involved in the project.
- The Tribe takes the position that all of Florida is still Indian country. The Tribe has cultural sites that would be in assumed waters and permits affecting those sites would not trigger consultation. The Tribe would like to get notice and have a chance to comment on all permits that could affect cultural resources. For example, reservoir releases in state-assumed waters may impact Tribal waters. In addition, the Tribe considers wetlands to be cultural resources, and these resources are extensively located throughout Florida.
- In the Operating Agreement between the Florida Department of Environmental Protection (FDEP) and the State Historic Preservation Officer (SHPO), the timeframe for coordination with tribes is very narrow and too small of a window.
- The Tribe currently gets notice from the Corps on all of the proposed 404 projects and does not see the same triggers in what the State is presenting for their program or in

the NHPA Section 106 process. The Tribe would also like government-to-government consultation for all projects that affect Tribal resources.

- The Tribe believes that the Everglades National Park and Big Cypress National Preserve are Indian country as described in the enabling legislation for those lands.
- The Tribe's federally-codified Settlement Agreement with the State of Florida indicates that certain lands which the State has perpetually leased to the Tribe shall be treated as if they are reservation lands for certain purposes. The Tribe's position is that these leased lands are therefore Indian country. The Tribe explained that the State took the Tribe's land to build a portion of I-75, and the Tribe had a particular understanding of being provided reservation land at the time of the Settlement Agreement. The Tribe further explained that this issue has not been litigated because the State has agreed with the Tribe's interpretation.
- The Tribe has not seen a copy of the final Operating Agreement between FDEP and the SHPO and has also not yet seen the draft NHPA Programmatic Agreement.
- The Tribe does not want to be lumped with other Tribes on the Programmatic Agreement because Miccosukee Tribe has its own unique concerns.
- The Tribe is concerned that the state legislature has passed a law that requires construction of a reservoir which has cultural burial grounds right in the middle of it. The Tribe is concerned that the State is bound by law and will not take appropriate measures to protect these cultural burial grounds. The Tribe does not support relocation, inundation or any effects on human remains.
- The Tribe's understanding is that FDEP is not going to seek any more resources to run the 404 program, and they do not believe that FDEP can adequately manage the programs they have now.
- The Tribe is concerned that FDEP will allow for Water Management Districts to take over a portion of the 404 permitting program permitting requirement and did not see anything in FDEP's proposed program that would prohibit that.

Muscogee (Creek) Nation

- There should be consultation with Tribes on the undertakings that would otherwise be taking place with the Corps.
- The Tribe noted that previously established Programmatic Agreements under section 106 of the NHPA often take a long time (e.g., up to a year). The Tribe does not believe a Programmatic Agreement can be completed within 2 months, as the process requires a lot consultation and coordination.
- The Tribe requested a draft of the Programmatic Agreement as soon as possible.
- The Tribe requested a meeting with the Advisory Council on Historic Preservation and all interested Tribes to discuss and review the Programmatic Agreement.
- The Tribe expressed that they are a sovereign nation, not the public, and therefore should not be bound to a 30-day review period for projects that may impact culturally sensitive areas.
- The Tribe believes that the undertaking is an adverse effect.

- The Tribe expressed that they are culturally connected with the Seminole Tribe and speak the same language.
- The Tribe expressed that they did not understand why EPA in this instance is viewing the EPA's review of the State of Florida's request as an undertaking that requires consultation under section 106 of the NHPA, while in other instances the EPA did not conduct section 106 consultation (e.g., the Tribe expressed that the EPA did not conduct 106 consultation in our delegation of programs to Oklahoma).
- The Tribe expressed that they do not understand why they were not consulted prior to the execution of the Memorandum of Agreement between EPA and the State of Florida and the execution of the Memorandum of Agreement between the U.S. Army Corps of Engineers and the State of Florida.
- OA, pg.1, I(A)(2)(b): "Indian Tribes" definition should only include federally recognized tribes. Bands, groups, and communities are public entities, not federally recognized tribes. Wanted to know where this language came from.
- OA, pg.1, I(A)(2)(b): The Tribe is unaware of consultation on state undertakings as they have only been contacted about federal undertakings in the past. Asked for examples of when Tribes are consulted on state undertakings.
- OA, pg.2, I(A)(2)(b)(i): The Tribe asked whether the state plans to consult with state recognized tribes? If so, the Tribe considers them to be the public and they should not be grouped with or consulted with federally recognized tribes.
- OA, pg.2, I(B)(1): From the Tribe: "Who at the [FDEP] is conducting historic properties review? Who is making the NRHP determinations? An SOI-qualified historian, archaeologist, etc. is required to make these decisions. We need to see the CV or resumes of the [FDEP] Staff who will make these determinations. The lead agency (the [FDEP]) is responsible for making determinations of no effect, no adverse effect, no historic properties effected, adverse effect, etc. Will the [FDEP] do this or will the SHPO do this? Through Section 106 consultation, tribes are asked to concur with the State or lead agency's finding of effect or let them know if there are cultural or religious properties that could be impacted by the 404 permit."
- OA, pg.3, I(B)(1)(b): The Tribe thinks the language stating that FDEP has duties and responsibilities *"To THPO or Indian Tribe when the interested Indian Tribe does not have a THPO."* is worded weirdly. Why not just put "federally recognized tribes with an area of interest?"
- OA, pg.3, I(B)(1)(b): From the Tribe: "Again, we have to remember that "Indian Tribe" as it is now, does not stipulate that they are federally recognized, but seems they could also be a band or some type of group (i.e. the public)."
- OA, pg.4, I(B)(1)(d): From the Tribe: "Tribes and public/local governments are listed separately here, which is correct. Due to this, do not try to send the Muscogee (Creek) Nation public notices when we are not the public. We are a sovereign nation and we will not take public notices as consultation on projects."
- OA, pg.4, I(B)(1)(d): From the Tribe: "How will the public be notified? Newspaper? Mail?"
- OA, pg.4, I(B)(1)(d): The OA states, *"In the event the [FDEP] employs a historic resource coordinator, the [FDEP] will coordinate with SHPO and the THPO/Indian Tribes to establish procedures to streamline certain categories of projects."* From the Tribe: "Streamlining certain projects would require another agreement document (e.g. programmatic agreement)."
- OA, pg.5, I(B)(2)(c)(ii): Regarding FDEP's duty and responsibility to *"On the same day received, provide information related to an unanticipated discovery, effects to historic resources, or the*

identification of unmarked human remain on issued no-notice general permits, general permits, and individual permits,” the Tribe wants to know how this will be done. By email? Phone call?

- OA, pg.5, I(B)(3)(a)(i): Regarding FDEP’s duty and responsibility to *“Review general permit and expedited applications to determine the presence or absence of cultural resources or historic properties of religious and cultural significance or request that the project be evaluated as an individual permit because of potential historical resources concerns,”* the Tribe asks: “Why are there expedited applications? This should not be a regular occurrence and putting this here makes it seem as if the agreement is giving them the chance to expedite all the applications they want. Why is this process needed? Are archaeological surveys required by applicants?”
- OA, pg.7, II(A)(1): Regarding FDEP’s email/notification of consultation during the initial review of a state permit, the Tribe states, “This will not be a public notice to the Tribe. Additionally, we want information provided pertaining to any surveys or sites that are in the area (FLSHPO).”
- OA, pg.9, II(B)(1)(a): Regarding the following procedures, *“[FDEP] will provide a public notice of all administratively complete State 404 Program individual permit applications pursuant to the provisions of Rule 62-331.060, F.A.C. SHPO, THPO/Indian Tribes shall receive an email notification of the public notice in accordance with paragraph 62-331.060(2)(a), F.A.C.,”* the Tribe states the following: “A public notice does not constitute tribal consultation. A consultation letter template should be made and used when notifying tribes and inviting them to consult on a state undertaking.”
- OA, pg.9, II(B)(2): Regarding the following procedures, *“The public notice shall specifically mention and solicit comment on the historic properties review process, including any initial effects determinations and recommendations received by SHPO/THPO/Indian Tribes during the Department’s initial review of the application. If the initial determination is that the activity will have no effect on historic properties, a “no potential to cause effect” or “no effect” statement shall be included in the public notice,”* the Tribe states the following, “This is a concern. Tribal comments should not be included in a public notice or be made available to the public. Also, the public should not receive an archaeological report. If any information is posted online for them to review with the application, then it should be highly redacted. Confidentiality is a major issue when identifying or when a project impacts a cultural site.”
- OA, pg.10, II(D): The Tribe asked “Why do the no-notice [General] permits require a quick 15-day review? What is the nature of the no-notice permits? What are examples of when this would apply? Explain further.”
- OA, pg.13, III(B)(1)(b): Regarding the following statement on continued consultation on the resolution of adverse effects, *“The Department, the SHPO, and THPO/Indian Tribes, if participating, may agree to invite other individuals or organizations to become consulting parties,”* the Tribe asks, “What other individuals or organizations would be invited? For a disagreement, would the ACHP involved?”
- OA, pg.13, III(B)(1)(c): Regarding the following statement on continued consultation on the resolution of adverse effects, *“The Department shall make information available to the public, subject to any confidentiality requirements. The Department shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking,”* the Tribe asks “Why would the public be involved if it is a disagreement between the Tribes and EPA? They should not be privy to this information.”
- OA, pg.14, III(B)(2)(e): Regarding the following statement on the resolution of adverse effects, *“If agreement cannot be reached, the Department shall attempt to continue consultation to reach an acceptable agreement. However, if agreement is not possible, the Department shall proceed according to Section III.C,”* the Tribe states “The ACHP should be involved if no agreement can be made.”

- OA, pg.15, III(C)(3): Regarding the following statement on federal review, *"The Department shall, in accordance with paragraph 62-331.052(3)(b), F.A.C., notify the EPA if the Department does not accept the effect determination of a proposed activity or recommendations for the resolution of adverse effects of the THPO/Indian Tribes, together with the Department's reason for doing so, in which case the EPA can comment upon, object to, or make recommendations,"* the Tribe asks "Who at the EPA will make this determination? What staff will work on this? Will they be an archaeologist? SOI-qualified individuals?"
- OA, pg.15, IV: Regarding the "Terms and Definitions" section, the Tribe states, "Add general permit" and "no-notice permit" to this."
- OA, pg.16, VI: Regarding the "Training Requirements, A-C" section, the Tribe states, "Yes, there should be training. The use of "occasional" means that it could happen a few times every year or just once every ten years. You need to define this better," and "Also, who will contact the Tribes so that they can provide training?"
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Poarch Band of Creek Indians

- OA relies on SHPO to make effects determination because FDEP doesn't have a qualified archeologist
- Need separate communication; SHPO response will not satisfy the Tribe
- Shortened review period under the OA
- The Poarch Band of Creek Indians wants the NHPA Programmatic Agreement to include a process that ensures that cultural resources are identified, potential effects on those resources are identified, and sets forth how mitigation will be addressed.
- The Poarch Band of Creek Indians requested a copy of the draft Programmatic Agreement as soon as possible and expressed concern that they would have sufficient time to review.
- The Poarch Band of Creek Indians would prefer to receive a copy of a draft Programmatic Agreement before providing written comments regarding the NHPA consultation.
- Will FDEP adopt NWP's?
- Will FDEP perform NEPA?
- How stringent will EPA's oversight of Florida's 404 program be after first year or two?

Seminole Tribe of Florida

- The Seminole Tribe shared that previous agreements with ACHP and Programmatic Agreements have precluded the Tribe from having a strong say in site-specific situations where cultural significance is at issue.
- The Seminole Tribe of Florida requested that EPA provide CWA elevation examples from other EPA Regions.
- The Seminole Tribe of Florida shared that they would have expected EPA to consult with them on this policy change. The Seminole Tribe of Florida treated their comments/process as if EPA's

approval of Florida's program wouldn't be discretionary, and were not aware of the Federal Register Notice.

- The Seminole Tribe of Florida would appreciate consultation on national policies like the ESA policy change in the future.
- The Seminole Tribe asked whether the BiOp would be updated to account for new species or whether new species would be handled on a permit-by-permit basis.
- The Seminole Tribe of Florida shared that endangered species issues are among the biggest issues and that they are commonly a subject of tribal consultation with the Corps, because of the tribe's geographic location.
- The Seminole Tribe of Florida is interested in having the ability to comment on a proposed project as a downstream affected jurisdiction.
- The application from DEP states the GPs will last for 5 years from effective date of transfer, but the Corps existing permit program will expire in 2022.
- The Seminole Tribe of Florida is concerned about cumulative effects of NWP on Tribal lands.
- The Seminole Tribe of Florida has been following NWP 12 for utilities with particular interest.
- The Seminole Tribe of Florida asked EPA to consider tribally-owned lands not in federal trust when thinking about impacts of general permits.
- Currently, the Seminole tribe works with SFWMD. Tribe is concerned about coordinating with multiple state agencies and educating them on the tribe's special status; i.e., five WMDs if delegation occurs.
- ERP component makes up to 85% of overall requirements of 404, according to state package; WMD will be working hand-in-hand on 404 reviews.
- The Seminole Tribe of Florida would like advance notice and a conversation with EPA if FL makes changes to the program such that Water Management Districts will be implementing the program, especially if the modification is just a letter modification.
- The OA does not currently provide a process or eligibility criteria to determine under what circumstances EPA will involve the ACHP. These criteria should be developed with associated timeframes within the PA.
- The Tribe requests that EPA involve ACHP in review of any disputes between the consulting parties on the area of potential effect and any disputes as to whether a site is eligible or potentially eligible for listing in the National Register of Historic Places (NRHP). These are areas of potential dispute that are not covered by the OA Federal Review section.
- In instances where ACHP's involvement is requested, consulting or commenting Tribes should be provided an opportunity to discuss the dispute with ACHP and EPA.
- The OA acknowledges at Section I. A.2.b.i that Indian tribes possess special expertise in assessing the eligibility of cultural resources or historic properties that may possess religious and cultural significance. The Seminole Tribe requests that a similar statement be included in the PA.
- The Tribe is also interested in the possibility of participating in the PA as an invited signatory due to the potential for FDEP's 404 Program to impact religious and culturally significant historic properties and the Seminole Tribe's foreseeable role as a consulting party under the OA.
- The Tribe requests to review the draft PA.
- The Tribe commented that the Operating Agreement does not currently reflect coordination with the ACHP.
- The Tribe strongly recommends a Programmatic Agreement be developed to clearly set forth in what circumstances EPA will involve the ACHP.

- The Tribe requested that they be a signatory to any Programmatic Agreement and that it be available to the Tribe for review before EPA decides on Florida's application to implement its own Section 404 Program.